IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 326 OF 2004

Cajetan Oliveira,
s/o Rosario Oliveira, businessman,
r/o H.No. 29, Ilha de Rachol,
Salcete - Goa. ..... Petitioner

Versus

1. Santano Dias,
   Cavorim, Chandor,
   Salcete, Goa.

2. Anthony Carvalho,
   Cavorim, Chandor,
   Salcete, Goa. ..... Respondents

Shri Y. V. Nadkarni, advocate for the Petitioner.

Shri V. P. Thali, advocate for the Respondents.

CORAM : R. M. LODHA, J.

DATE : 28th September, 2005.

ORAL ORDER

Heard Mr. Y. V. Nadkarni, the learned counsel for the petitioner and Mr. V. P. Thali, the learned counsel for the respondent nos.1 and 2.

2. By the impugned Order dated 23rd April, 2004,

the First Additional Civil Judge, Senior Division at Margao, rejected the petitioner's application for condonation of delay in making the application for setting aside the ex parte decree dated 18th February, 1999 belatedly.

3. The present respondents (hereinafter referred to as "the plaintiffs") filed a suit for specific performance of the Agreement dated 16th July, 1988, and in the alternative, compensation in the sum of Rs.2,67,554/- against the present petitioner (hereinafter referred to as "the defendant") in the Court of the Civil Judge, Senior Division at Margao, on 30th March, 1991. But in substance the suit is for recovery of an amount of Rs.2,67,554/- . It appears that after service of summons, the defendant he engaged Advocate R. A. Kharangate. It further appears that the defendant traversed the plaintiffs' claim by filing written statement on 12th April, 1993. In the written statement the defendant also raised the claim in the sum of Rs.l,79,000/- by way of counter-claim against the plaintiffs. The Court framed issues and kept the matter for evidence. On few occasions, the Presiding Officer was not available. The matter was fixed on 27th August, 1993 and on that day neither the defendant nor his

advocate appeared. Hence by the Order dated 27th August, 1993, the trial Court ordered the matter to proceed ex parte against the defendant. On none of the dates of hearing thereafter the defendant or his advocate appeared. Consequently, the suit was decreed ex parte on 18th February, 1999.

4. The defendant applied for setting aside the ex parte decree dated 18th February, 1999 on 3rd March, 2001. As the application for setting aside the ex parte decree was barred by time, an application was made by the defendant for condonation of delay. In the application for condonation of delay the defendant sought to explain the delay thus: that in the month of March 2000 he came to know of an ex parte decree; that application for obtaining the certified copy of the ex parte Judgment and Decree was made immediately thereafter; that the certified copy was received on or about 27th July, 2000; that the defendant contacted his advocate R. A. Kharangate but because of non-availability his affidavit could not be sworn and the application for setting aside the decree was made on 3rd March, 2001. The defendant also stated in the application that he could not meet his advocate after July 1993 because his name got involved in some

murder case and fearing arrest he remained underground for about two years. Then he was arrested in the year 1995 and remained in custody for sometime. Thereafter he was released on bail with some conditions and in the circumstances, he could not attend the proceedings in the suit filed by the plaintiffs.

5. In support of his case the defendant filed his own affidavit and the affidavit of advocate R. A. Kharangate.

6. The application was contested by the plaintiffs.

7. The trial Court after hearing the parties dismissed the application for condonation of delay vide Order dated 23rd April, 2004 giving rise to the present Writ Petition.

8. Mr. Y. V. Nadkarni, the learned counsel for the petitioner relied upon the judgments of the Supreme Court in the cases of ***M. K. Prasad vs. P. Arumugam,*** (2001) 6 SCC 176, ***V. K. Industries & Ors. vs. M. P. Electricity Board, Rampur, Jabalpur*** , (2002) 3 SCC 159 and ***G. P. Srivastava vs. R. K. Raizada & Ors.*** , (2000) 3 SCC 54 and submitted that there was no lack of diligence on the part of the defendant in attending the proceedings in the suit. The learned counsel contended that the defendant was not guilty of dilatory tactics but the circumstances

were created such that he could not attend the proceedings in the suit on and after 27th August, 1993. He submitted that by awarding reasonable costs, the inconvenience caused to the plaintiffs may be compensated in terms of money. The learned counsel also submitted that if directed the defendant would deposit the principal amount of Rs.l,68,733.50 p.

9. On the other hand, the learned counsel for the plaintiffs submitted that the facts stated in the application do not spell out special cause justifying the condonation of delay and, therefore, the trial Court cannot be said to have erred in rejecting the defendant's application for condonation of delay in making the application for setting aside the ex parte decree belatedly.

10. I reflected over the matter and considered the submissions of the learned counsel for the parties and the available material.

11. It is true that after service of writ of summons, the defendant put in appearance; that he engaged the advocate R. A. Kharangate and filed his written statement and also the counter-claim. However thereafter on on 27th August, 1993, the defendant did not appear nor did his advocate R. A. Kharangate

appear and on that day the trial Court passed the order for proceeding with the matter ex parte against the defendant. The ex parte proceedings continued for more than five years and it was only on 18th February, 1999, that the ex parte decree came to be passed. For a period of almost 5 1/2 years the defendant slipped into deep slumber and took no steps in finding out the progress in the suit or the counter/claim. This is not a matter of negligence simpliciter but a deliberate attempt on the part of the defendant in prolonging the matter. How could otherwise a litigant who had filed written statement and also the counter-claim not contact his advocate for more than 5 1/2 years or in finding out the progress of the case? Even if it be assumed that the defendant was involved in some criminal case, the facts that have come on record reveal that this situation remained only for about two years for the period from 1993 - 1995. Even thereafter the defendant did not choose to contact his advocate, nor did he try to find out the progress of the case though the decree was passed ex parte only on 18th February, 1999.

12. The defendant has set up the case that he came to know of the ex parte decree dated 18th February, 1999 in

the month of March, 2000. This does not inspire confidence. Even if it be assumed to be so, according to the defendant, the application for obtaining the certified copy of the ex parte decree was made thereafter and obtained in the month of July, 2000 (on or about 27th July, 2000 as stated in the application) and the application for setting aside the ex parte decree was made only on 3rd March, 2001. The explanation that after the certified copy of the Judgment and Decree was obtained on 27th July, 2000, the application could not be filed as advocate R. A. Kharangate was not available to sign the affidavit, hardly merits acceptance. In the affidavit filed by Advocate R. A. Kharangate, there is not even a whisper that he was not available in the month of July 2000 or thereafter. The delay from 27th July until 3rd March, 2001 remains unexplained. The material, therefore, does not spell out sufficient cause for condonation of delay. The whole attempt on the part of the defendant has been to set up make-believe ground with the design to protract the litigation which cannot be countenanced. The conduct of the petitioner in the matter is far from satisfactory.

13. In the case of ***G. P. Srivastav vs. R. K.***

Raizada & Ors. (supra) the Apex Court observed that the words "was prevented by any sufficient cause from appearing", must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to the aggrieved party. The facts here as already noticed above, show otherwise and depict deliberate attempt on the part of the defendant in letting the ex parte decree passed and then also making an application for setting aside the ex parte decree belatedly only with the purpose of protracting and prolonging the litigation. Even with all liberal and justice-oriented approach, the facts that have come on record here do not make sufficient case. ***G. P. Srivastava's*** case (supra), thus, does not apply to the facts of the case.

14. In ***M. K. Prasad vs. P. Arumugam*** (supra), the Apex Court observed that while deciding the application for setting aside the ex parte decree the Court should keep in mind the judgment impugned, the extent of the property involved and the stake of the parties. Here the decree that has been passed is a money decree. The trial Court has considered the matter in the right perspective. There is material on record that shows that on

earlier occasions in two different suits, the present defendant suffered ex parte decree and almost similar grounds for setting aside the ex parte decree was set up which were not accepted and the application for setting aside the ex parte decree came to be rejected by the trial Court and maintained by this Court

15. In the case of ***V. K. Industries & Ors. vs. M. P.Electricity Board, Rampur, Jabalpur*** (supra), the Supreme Court held that while setting aside the ex parte decree the condition to deposit costs imposed by the High Court were onerous, harsh and unreasonable and, accordingly, interfered with the order of the High Court. The said judgment has no application whatsoever to the facts of the present case.

16. The trial Court in paragraphs 5, 6, 7 and 8 of the impugned Order has elaborately considered the submissions of the parties and then reached the conclusion that the delay in approaching the Court has not been explained to show that there was sufficient cause as contemplated under Section 5 of the Limitation Act, 1963. The consideration of the matter by the trial Court cannot be said to suffer from any illegality warranting interference by me in extraordinary jurisdiction of this Court.

17. The Writ Petition does not deserve to be admitted and is dismissed in limine.

R. M. LODHA, J.

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